

No. 15710 ✓

---

---

United States  
Court of Appeals  
for the Ninth Circuit

---

JACK SHOWELL and DOROTHY SHOWELL,  
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

---

Transcript of Record

---

Petition to Review a Decision of The Tax Court  
of the United States

FILED

NOV 15 1957

PAUL E. BISHOP, CLERK



No. 15710

---

---

United States  
Court of Appeals  
for the Ninth Circuit

---

JACK SHOWELL and DOROTHY SHOWELL,  
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

---

Transcript of Record

---

Petition to Review a Decision of The Tax Court  
of the United States

---

---



## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Appearances .....	3
Brief of Petitioners filed Feb. 23, 1954 (Excerpt) .....	6
Brief for Respondent filed Mar. 1, 1954.....	16
Certificate of Clerk to Transcript of Record...	34
Decisions:	
Docket No. 48153.....	27
Docket No. 48154.....	28
Docket Entries (48153).....	3
Memorandum Findings of Fact and Opinion (48153-4) .....	22
Names and Addresses of Attorneys.....	1
Petition for Review (48153).....	29
Notice of Filing.....	33
Statement of Points and Designation of Record (USCA) .....	35



## NAMES AND ADDRESSES OF ATTORNEYS

McLANE & McLANE,

NOLA McLANE,  
806 Security Building,  
Phoenix, Arizona,

For Petitioners.

CHARLES K. RICE,  
Assistant U. S. Attorney General,

LEE A. JACKSON,  
Attorney,  
Department of Justice,  
Washington 25, D. C.,

For Respondent.





## APPEARANCES

For Petitioner:

W. LEE McLANE, JR., Esq.

For Respondent:

EARL C. CROUTER, Esq.

Nov. 16 1954 Reassigned to Judge Tietjens

---

Tax Court of the United States

Docket No. 48153

JACK SHOWELL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

## DOCKET ENTRIES

1953

Apr. 30—Petition received and filed. Taxpayer notified. Fee paid.

May 1—Copy of petition served on General Counsel.

May 27—Answer filed by General Counsel.

May 27—Request for hearing in Phoenix, Arizona, filed by General Counsel.

June 5—Notice issued placing proceeding on Phoenix, Arizona calendar. Service of answer and request made.

Sept. 24—Hearing set Nov. 30, 1953, Phoenix, Ariz.

1953

Dec. 2—Hearing had before Judge Withey on the merits. Petitioner's oral motion for leave to file amendment to petition in docket 48154—granted. Docket Nos. 48153 and 48154 consolidated for trial. Briefs due 3/2/54; Replies due 4/1/54.

Dec. 21—Transcript of hearing 12/2/53 filed.

1954

Feb. 23—Brief filed by taxpayer. 3/2/54 copy served.

Mar. 1—Brief filed by General Counsel.

Mar. 22—Reply brief filed by petitioner. 3/23/54 copy served.

Dec. 16—Findings of fact and opinion filed. Judge Tietjens. Decision will be entered under Rule 50. Copy served 12/16/54.

1955

Jan. 24—Agreed computation filed.

Jan. 26—Decision entered. Judge Tietjens. Div. 1.

Mar. 9—Petition for review by United States Court of Appeals, Ninth Circuit, with assignments of error filed by taxpayer.

Mar. 9—Proof of service filed.

Mar. 9—Designation of contents of record on review with proof of service acknowledged thereon, filed by taxpayer.

Apr. 12—Order extending time to 6/7/55 for filing the record and docketing the appeal, entered.

1955

May 6—Transcript of original record sur petition for review sent Clerk United States Court of Appeals, Ninth Circuit.

1956

Dec. 3—Mandate from United States Court of Appeals, 9th Circuit, that case is hereby remanded for further proceedings, filed.

Dec. 10—Order that proceeding is placed on the Washington, D. C. calendar of 1/23/57 with leave to parties to submit computations on or before said date, entered. 12/11/56 served.

1957

Jan. 2—Motion to conform judgment to findings with attached memorandum in support, filed by petitioner. 1/9/57 served.

Jan. 8—Hearing set Jan. 23, 1957, Washington, D. C. on petitioner's motion. 1/9/57 served.

Jan. 23—Hearing had before Judge Tietjens on petitioner's motion to conform judgment to findings. Further proceedings under Mandate. Held CAV.

Jan. 28—Motion of Jan. 2, 1957 is denied. 1/29/57 served.

Jan. 31—Memorandum findings of fact and opinion filed, Tietjens, J. Decision will be entered under Rule 50. 2/1/57 served.

Apr. 17—Motion for entry of decision under Mandate, with attached recomputation, filed by respondent.

1957

Apr. 19—Hearing set on respondent's motion 5/22/57, Washington, D. C. 4/22/57 served.

May 22—Hearing had before Judge Murdock on respondent's motion for decision under Mandate. Referred to Judge Tietjens.

May 27—Decision entered, Judge Tietjens, Division 1. 5/28/57 served.

July 11—Petition for review by United States Court of Appeals, Ninth Circuit, with assignments of error filed by petitioner.

July 18—Proof of service filed.

July 18—Designation of contents of record on review with proof of service thereon, filed by petitioner.

---

[Title of District Court and Cause.]

### PETITIONERS' BRIEF

[Clerk's Memo: Excerpt from petitioners' brief filed February 23, 1954.]

#### Petitioners' Request for Findings of Fact

Petitioners request the Court to find the following facts:

1. Jack Showell, hereafter called Showell, was engaged in the business of booking bets on football, basketball, and baseball games during 1949 (Tr. 26, 27).

2. During 1949 Showell did not accept any bets on horse races (Tr. 27).

3. The manner in which the business was carried on is as follows:

Bettors could place a bet on either of two teams participating in a baseball, basketball, or football game at odds of six against five. In other words, the bettor was required to bet six dollars in order to win five dollars. Thus, petitioner Showell would make one dollar if one person bet six dollars on one team while the other person bet six dollars on the other team. This was so because the winner received only eleven dollars while the petitioner had collected twelve dollars. Therefore, Showell could not lose as long as there was an equal amount of money bet on each team. In an effort to keep the money bet on each team as nearly equal as possible, "point spreads" were utilized. This meant that one team might be made the favorite by several points. Thus, if Michigan was a seven point favorite over Minnesota, the person betting on Michigan could not win unless Michigan won by more than seven points. The man betting on Minnesota would win if Michigan won by less than seven points. If the score was 14-7, both bets were off, and each bettor received his money back. The element of risk to Showell was introduced only when more money was bet on one team than the other. In that event, either the winnings would be greater or the losses would be larger. As long as bets were evenly placed, Showell had to make 8.3% profit (Tr. 26, 27, 28).

4. Showell gave no receipts or tickets of any kind to bettors during 1949 (Tr. 28).

5. The reason for this procedure was that about 90% of the bets were taken over the telephone from people known to Showell (Tr. 28).

6. When a wager was made, Showell recorded it either on an individual piece of paper or a tally sheet (Tr. 28, 29).

7. Tally sheets were used for individuals who made several bets at a time (Tr. 29).

8. Both the individual slips of paper and the tally sheets were retained for two or three months after the game had been played or until all claims had cleared (Tr. 75, 75).

9. After the game was over, the individual slips and tally sheets were examined for winners and losers (Tr. 28, 29).

10. Each winning bet was marked with a circle, and the amount to be paid to that bettor marked on the slip (Tr. 28).

11. Each losing bet was marked with an "X" (Tr. 28, 29).

12. At the end of the day or week depending on whether it was football season or not, Showell and Houston L. Walsh totaled the amounts to be paid to all winning bettors and the amounts lost by all losing bettors (Tr. 28, 29, 30, 88, 89, 90, 91, 92, 93).

13. If the total of amounts lost by bettors exceeded the total of amounts to be paid to winning bettors, the difference was recorded under a column entitled "Gain" (Tr. 29, 30, 31, 33).

14. The recording was made on a sheet of yellow tabular paper entitled "Sports—1949" (Tr. 30, 31).

15. If the total of amounts to be paid to winning bettors was larger than the total of amounts lost by losing bettors, the difference was recorded under a column entitled "Loss" (Tr. 28, 29, 31).

16. This recording was also made on the same

sheet of yellow paper entitled "Sports—1949" (Tr. 30, 31).

17. The entries from January 1, 1949 to December 7, 1949 were made by Houston L. Walsh (Tr. 31, 89).

18. The entries from the "December 1st Rent" note through the balance of the year were made in by petitioner Jack Showell (Tr. 31).

19. The amounts recorded by petitioner Jack Showell and Houston L. Walsh were obtained in the following fashion:

Petitioner Showell would read out the amount won on each winning bet from each slip of paper or tally sheet to Houston L. Walsh who added them up on an adding machine. The same procedure was used for the losing bets. When both totals were obtained, Houston L. Walsh traded places with Showell so that Walsh read out the amount of each winning bet, and then the amount of each losing bet to Showell who would then operate the adding machine. In this fashion the total of winning bets and the total of losing bets were double-checked. (Tr. 30-31, 89, 90, 91, 92, 93.)

20. The six following items appear in the "Loss" column which did not represent net losses from a particular day or week's wagering operations: (Ex. 3).

21. On December 1st, Showell entered \$125.00 as rent paid in the "Loss" column (Ex. 3; Tr. 33, 34).

22. On December 14th, he recorded \$39.40 in the "Loss" column as an amount paid to Western Union for ticker services (Ex. 3 & 4; Tr. 34).

23. On December 22nd, Showell recorded \$60.00 in the "Loss" column paid to Athletic Publications for receiving official odds on games. (Ex. 3, 5; Tr. 35).

24. On December 22nd, Showell recorded in the "Loss" column \$100.82 to the Mountain States Telephone Co. for telephone service (Ex. 3, 6; Tr. 36).

25. The above four items total \$345.22 which when subtracted from the total appearing in the "Gain" column of \$22,908.99 results in \$22,563.66. One half of \$22,563.66 or \$11,281.83 is the amount of additional income assessed by the respondent against each of the petitioners in this case (Ex. 1, 2, 3; Tr. 15, 16).

26. On December 31st, Showell recorded an item in the "Loss" column of \$2,447.50 representing uncollected bets at the end of 1949 which had already been recorded in the daily and weekly entries during 1949 (Ex. 3; Tr. 37).

27. On December 31st, Showell recorded an item in the "Loss" column of \$1,350.00 representing an uncollected bet from C. E. Leech which had already been recorded in the daily and weekly entries during 1949 (Ex. 3; Tr. 43, 44).

28. The above two entries in the "Loss" column were necessary because the amounts had previously been considered a part of the winnings of specific days or weeks (Tr. 37, 43).

29. Petitioner Showell's original permanent record of net gains and losses from wagering operations during 1949 showed that the total of those



days when there was a net gain was \$22,908.88 and the total from those days when there was a net loss was \$23,489.97 resulting in net loss from the business of \$581.09 for the year 1949 (Ex. 3).

30. Respondent used the amount of \$22,908.88, or only the total of amounts recorded on petitioner Showell's record for those days when there was a net gain, as the basis for computing a deficiency and subtracted from it \$345.22 of expenses (Ex. 1, 2; Tr. 11, 15, 16, 21, 22).

31. Respondent refused to accept petitioner Showell's original record insofar as all of the amounts appearing under the "Loss" column are concerned with the exception of a total of \$345.22 of expense allowed (Ex. 1, 2; Tr. 16).

32. Respondent's agent, H. L. Mende, testified as to the reason why the action was taken as follows:

Q. "Mr. Mende, would you explain to the Court why the figures appearing in the 'Loss' column in Exhibit 3 were disallowed or rejected as proper losses from gambling operations?"

A. They were not substantiated as to who they were paid to and, of course, gambling losses were not to be allowed in excess of the gains. We were not able to determine how much money was earned by commissions and how much was lost by wagering, and they wanted to test it out whether proper records should be kept in the case. (Underscoring supplied)

Q. Were any of the gains or losses used in computing the 'Gain' column substantiated?

A. No more than the losses." (Tr. 18).

33. Therefore, respondent accepted as proper and accurate the method of accounting used by petitioner on those days in which a net gain resulted, but rejected the same method of accounting on those days when net losses were sustained (Tr. 11, 15, 16, 18, 21).

34. Exhibit 3 was made available to respondent during his examination, and it was in fact the record which served as the only basis of respondent's deficiency (Ex. 1, 2; Tr. 11).

35. Showell forwarded his permanent record entitled "Sports—1949" to his accountant at the end of 1949 (Tr. 32).

36. Petitioner Showell realized a net loss from wagering operations for the year 1949 of \$581.09 (Ex. 3, Entire Record).

37. Petitioner Showell did not earn additional income of \$22,563.66 from wagering operations in 1949 (Entire Record).

### Argument

The issue in these cases is whether during the taxable year 1949 petitioner Jack Showell had an income of \$22,563.66 from the business of booking bets on baseball, basketball, and football games. Petitioners feel that a negative answer is necessary in view of the record herein.

### Summary of Relevant Facts

Jack Showell, a resident of Phoenix, Arizona for twenty-three years, was engaged in the business

of booking bets on baseball, basketball, and football games during the year 1949. He did not take bets on horse races. The manner in which the business was conducted is as follows:

Bettors could place a bet on either team at odds of six against five. This means that a bettor would be required to bet six dollars to win five dollars. Thus, the person booking the bet would make one dollar if one individual bet six dollars on one team and another bet six dollars on the other team. This was so because the winner was paid only eleven dollars while the loser received nothing. Consequently, anyone booking a bet could not lose as long as there was an equal amount of money bet on each team. In an effort to keep the money bet on each team as nearly equal as possible, point spreads were utilized. This meant that one team might be made the favorite by several points. Thus, if Michigan was a seven point favorite over Minnesota, a person betting on Michigan would not win unless Michigan won by more than seven points. If the resulting score was 14 to 7, there would be a cancellation of the bets and each bettor would get his money back. The element of risk was introduced when more money was bet on one team than the other. When this happened, either the winnings were greater or the losses larger.

When a bet was made with petitioner Jack Showell during 1949, no receipt or ticket of any kind was given to the bettor. The reason for this procedure was that about 90% of the business was done over the telephone with people known to peti-

tioner. After the wager was made, Showell recorded it on a slip of paper. Occasionally, several bets of one individual were recorded on one tally sheet. After the game, the slips and tally sheets were examined for winners and losers. Each winning bet was marked with a circle, and the amount to be paid to that bettor noted on the slip or tally sheet. Losing bets were marked with an "X". At the end of the day or week depending on whether it was football or basketball season, petitioner and Houston L. Walsh totaled the amounts to be paid to winning bettors and the amounts lost by losing bettors. If the total of amounts lost by bettors exceeded the total of amounts to be paid to winning bettors, the difference was recorded as a "Gain" on a sheet of tabular paper. On the other hand, if the total of amounts to be paid to winning bettors was larger than the total of amounts lost by losing bettors, the difference was recorded as a "Loss" on the same sheet of paper. The net gains appeared under a column entitled "Gain" while the net losses fell under a column designated "Loss".

The only exceptions to the above procedure came under the "Loss" column for December 1st, 14th, 22nd, and 31st. On the first three days, amounts of expense were recorded while \$3,797.50 (\$2,477.50 plus \$1,350.00) of uncollected bets were recorded on December 31st. The entries of December 31st were necessary because these uncollected winnings had already been recorded earlier in the year when the bets were won. Each of the individual bet slips and tally sheets were retained for a few months un-

til the winning bettors had been paid, and then they were discarded.

At the end of the taxable year 1949 petitioner Showell forwarded the tabular sheet showing the net gains and net losses for each day or week to his firm of accountants. This sheet of tabular paper entitled "Sports—1949" remained in the hands of petitioner's accountants.

Petitioner reported no income from the business of booking bets during 1949 because the yearly total of the daily and weekly net gains was \$22,908.88 and the total of the daily and weekly net losses was \$23,489.97. The difference or \$581.09 represented a net loss for the year.

Both deficiencies arise from the fact that respondent has accepted the amounts appearing in the "Gain" column as being correct, but has disallowed all but four items appearing in the "Loss" column. The result is that the total of the amounts in the "Gain" column or \$22,908.88 less \$345.22 of expense (\$125.00 of rent plus \$59.40 to Western Union plus \$60.00 to Athletic Publications plus \$100.82 to the Telephone Company) or \$22,563.66 was found by respondent to be additional income to petitioner and his spouse.

It should be especially noted that the same record or sheet of tabular paper was considered as completely accurate by the Commissioner insofar as net gambling gains were concerned, but wholly rejected as far as net gambling losses were concerned. In other words, the Commissioner used petitioner's record as the basis for its deficiency

on the theory that the entries were correct for those days when a net gain resulted, but refused to accept the same record when a day or week resulted in a net loss.

---

[Title of Tax Court and Docket Nos. 48153-4.]

## BRIEF FOR RESPONDENT

### Preliminary Statement

This is a proceeding for redetermination of a deficiency in income tax of the petitioners as follows:

Docket No.	Year	Tax	Deficiency
48153	1949	Income	\$3,946.65
48154	1949	Income	\$4,065.69

The hearing was held before Judge Graydon G. Withey in Phoenix, Arizona, on December 2, 1953. On motion the two dockets herein were consolidated by order of the Court. The evidence consists of oral testimony and exhibits taken at the hearing. March 2, 1954, was set by the Court as the date for filing of simultaneous opening briefs and April 1, 1954, as the date for reply briefs.

### Question Presented

1. Whether petitioners are entitled to deduct certain sums allegedly representing wagering losses under section 23 (h), Internal Revenue Code.

### Statutes and Regulations Involved

Internal Revenue Code:

“Sec. 23. Deductions from gross income.

\* \* \* \* \*

“(h) Wagering Losses.—Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions.”

\* \* \* \* \*

“Sec. 54. Records and special returns.

“(a) By Taxpayer.—Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

“(b) To Determine Liability to Tax.—Whenever in the judgment of the Commissioner necessary he may require any person, by notice served upon him, to make a return, render under oath such statements, or keep such records, as the Commissioner deems sufficient to show whether or not such person is liable to tax under this chapter.”

\* \* \* \* \*

Regulations 111:

“Sec. 29.23(h)-1. Wagering losses.—Deductions for losses from wagering transactions are allowed only to the extent of gains from such transactions. In the case of a husband and wife making a joint return, the combined losses of the spouses as a result of wagering transactions shall be allowed to the extent of the combined gains of the spouses from such transactions.”

“Sec. 29.54-1. Records and income tax forms.—Every person subject to the tax, except persons whose gross income (1) consists solely of salary,

wages, or similar compensation for personal services rendered, or (2) arises solely from the business of growing and selling products of the soil, shall, for the purpose of enabling the Commissioner to determine the correct amount of income subject to the tax, keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown in any return under chapter 1. Every organization exempt from tax under section 101 but required by section 54(f) to file an annual return shall keep such permanent books of account or records, including inventories, as are sufficient to show specifically the items of gross income, receipts, and disbursements, and such other information as is required by section 29.101-2. The books or records required by this section shall be kept at all times available for inspection by internal-revenue officers, and shall be retained so long as the contents thereof may become material in the administration of any internal-revenue law.

“Income-tax forms shall be prescribed by the Commissioner and shall be executed and filed in accordance with these regulations and the instructions on the form or issued therewith.

“The provisions of section 54(f) relieving certain specified types of organizations exempt from tax under section 101 from filing annual returns do not abridge or impair in any way the powers and authority of the Commissioner provided for in other provisions of the Internal Revenue Code to



require the filing of such returns by such organizations. For further regulations regarding proof and establishment of right to exemption from tax, for filing of returns and keeping records by organizations exempt from tax, see sections 29.101-1 and 29.101-2.”

Respondent's Request for Findings of Fact

1. Petitioners are husband and wife, citizens and residents of the State of Arizona. Their separate individual tax returns for the year 1949 were filed with the Collector of Internal Revenue for the District of Arizona.

2. During the year 1949 petitioners had several income producing businesses and interests (Tr. 25, 80), and petitioner Jack Showell, who shall hereinafter be referred to as the petitioner, was a man of long business experience and considerable financial means. (Tr. 25; Pet. Ex. 9). Petitioner kept regular and permanent books and records of the operation of all such businesses and interests (Tr. 80), except wagering transactions on sporting events (Pet. Ex. 3; Tr. generally).

3. Petitioner's method of accounting for the results of wagering transactions was to record on slips of paper the essential facts of each wager, to add up the day's wins and losses and record the excess only of gains or losses opposite the date. (Tr. 28-33). The original slips of paper and other sheets were destroyed (Tr. 32, 59), and the only permanent record retained was the entry of such final results of each day's betting (Ex. 3).

4. Although requested by respondent to furnish records of gains and losses, with names and addresses of wagerers (Tr. 62, 71), petitioner furnished nothing more than the single sheet showing the final results of each day's transactions (Tr. 64, 72, 73) and testified that it would be impossible to furnish the identity of wagerers.

5. Respondent requests the Court to find the following ultimate facts: That petitioner did not keep regular, adequate and permanent books and records in respect of wagering transactions and has failed to prove the amount of losses therefrom.

### Argument

#### I.

The petitioners are not entitled to deductions claimed for alleged gambling losses, under section 23(h), Internal Revenue Code.

Petitioner had business activities and interests in addition to his wagering transactions and in consequence had an obligation to maintain permanent books of account of the wagering transactions so as to permit respondent to determine his correct tax liability therefrom. (Reg. 111, Sec. 29.54-1). Petitioner did keep regular and permanent books of account for all of his activities other than gambling. The reason for this exception is obviously that he considered it of doubtful legality. The names and addresses of bettors were carefully avoided. The intended result is that petitioner's records of wagering transactions are not susceptible to investigation. It is impossible to audit the meager records kept by petitioner. The respondent

cannot determine his correct tax liability from the records furnished by the petitioner. Unless this petitioner and all others in like situation can be put to their proof of alleged losses which they wish to offset against gambling gains, they enjoy a position of favor on tax day that no regular and legitimate businessman can attain. The undesirability of this result is expressed very well by the Court of Claims in the case of *Harry V. Johnson v. The United States* (1941) 94 Ct. Cls. 345, 39 F. Supp. 103, 27 A.F.T.R. 563. The petitioner freely admits that it is impossible for him to identify and verify the items which constitute his gambling gains and losses and his proof of losses is confined to testimony that the final tabulation of gains and losses for each day's transactions was correct when made. This does not constitute proof of either gains or losses. It is self-serving and adds nothing more to the tax return itself.

#### Conclusion

It follows that the determination of the Commissioner of Internal Revenue should be sustained.

/s/ DANIEL A. TAYLOR,

Chief Counsel, Internal Revenue  
Service.

Of Counsel: Woolvin Patten, Acting Regional Counsel, E. C. Crouter, Associate Appellate Counsel, R. E. Maiden, Jr., Assistant Appellate Counsel, Clayton J. Burrell, Special Attorneys, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed March 1, 1954.

T. C. Memo. 1957-22

## Tax Court of the United States

Jack Showell, Petitioner, v. Commissioner of Internal Revenue, Respondent.

Dorothy Showell, Petitioner, v. Commissioner of Internal Revenue, Respondent.

Docket Nos. 48153, 48154. Filed January 31, 1957.

W. Lee McLane, Jr., Esq., for the petitioners.

Earl C. Crouter, Esq., for the respondent.

### MEMORANDUM FINDINGS OF FACT AND OPINION

Tietjens, Judge: The respondent determined deficiencies in the income tax of the petitioners for 1949 as follows:

	Docket No.	Deficiency
Jack Showell . . . . .	48153	\$3,946.65
Dorothy Showell . . . . .	48154	4,065.69

These deficiencies resulted from the respondent's determination that each of the petitioners realized income of \$11,281.83 from wagering operations during 1949.

On petition to this Court we held in *Jack Showell*, 23 T.C. 495, that the respondent should have allowed a deduction of an additional \$3,000 for wagering losses.

The case is again before us on remand from the United States Court of Appeals for the Ninth Circuit, *Jack Showell and Dorothy Showell*, 238 F. 2d 148, (rehearing denied), for further proceedings

on the "ground that the findings were not sufficiently definitive." We therefore make the following:

#### Findings of Fact

The petitioners are husband and wife and filed their separate income tax returns for 1949, prepared on the community basis, with the collector for the district of Arizona.

In their returns for 1949 the petitioners reported income from interest, from a partnership, and rental income from a building. No income was reported from, or loss deducted with respect to, any wagering operations.

During 1949 Jack Showell, sometimes referred to as the petitioner, received money from booking bets on baseball, football and basketball games. No receipts or tickets were given for money placed on bets. The petitioner did not keep regular, adequate and permanent books and records of his wagering transactions.

Petitioner had unreported income from wagering operations in 1949 amounting to \$19,563.66.

#### Opinion

In determining the deficiencies herein the respondent determined that the petitioner had income of \$22,536.66 from wagering operations in 1949, one-half of which was taxable to each petitioner. On the other hand, petitioners allege in their petitions that the gambling transactions in that year resulted in a loss of \$2,046.26.

As indicated by the opinion of the Court of Ap-

peals herein, the burden is on the taxpayer to sustain by competent evidence his claimed deductions. In other words, it is petitioner's burden to prove error in the respondent's determination, the effect of which was to disallow claimed gambling losses.

To sustain that burden the petitioner relies almost exclusively upon his own testimony and that of his accountant. They told the Court in some detail how the gambling operations were carried on and described the records they kept. But the only record introduced in evidence was Exhibit 3, a single sheet of yellow foolscap, which was as follows:

SPORTS—1949		
	Gain	Loss
January 1.....	\$ 3,950.00	—
September 17.....	—	\$ 882.50
"    24.....	—	97.10
October 2.....	3,469.35	—
"    8.....	—	6,571.95
"    9.....	686.00	—
"    15.....	—	1,363.60
"    22.....	3,211.00	—
"    29.....	—	2,026.00
November 5.....	3,767.55	—
"    13.....	—	4,346.50
"    19.....	1,079.70	—
"    20.....	—	1,241.10
"    27.....	402.60	—
December 3.....	1,016.73	—
"    3.....	—	450.00
"    5.....	20.00	—
"    6.....	43.00	—
"    7.....	21.00	—
"    1 Rent.....	—	125.00
"    9.....	510.00	—
"    10.....	—	274.50
"    11.....	570.00	—

SPORTS—1949		
	Gain	Loss
December 12.....	372.00	—
” 13.....	—	902.00
” 14 W. U.....	—	59.40
” 14.....	164.80	—
” 15.....	153.15	—
” 16.....	—	705.00
” 17.....	584.00	—
” 18.....	—	487.00
” 19.....	859.00	—
” 20.....	796.00	—
” 21.....	96.00	—
” 22.....	31.00	—
” 22 A. P.....	—	60.00
” 22 Tele.....	—	100.82
” 23.....	1,106.00	—
” 31.....	—	2,447.50
” 31 Leech .....	—	1,350.00
	<u>\$22,908.88</u>	<u>\$23,489.97</u>
		<u>22,908.88</u>
		<u>581.09</u>

The petitioner and his accountant testified that the figures appearing on this sheet were arrived at by adding together for a particular day the amounts to be paid winning bettors as shown on the original betting slips and tally sheets and then balancing against this the total amount of losses for that day taken from the same sources. The total of wins or losses for the day was thus obtained and that total was entered on the sheet for each day shown thereon.

Aside from Exhibit 3 the petitioner maintained no account or record with respect to money received by him in his betting transactions or the sums paid out to winning bettors during the year.

The original slips or tally sheets on which bets were noted at the time they were made were destroyed. None of the original betting slips or tally sheets were ever furnished to the revenue agents and neither the respondent nor this Court has had any way of testing the accuracy of the totals appearing on the foolscap sheet unless we accept as wholly true the testimony of petitioner and his accountant that every actual gain or loss was correctly entered thereon.

However, as the Court of Appeals points out "the fact triers had the right to disbelieve Jack Showell and his close office associate, Walsh. Similarly, they have the right to remain unconvinced, to retain an abiding doubt, and to rule against the petitioner." The Court of Appeals also states that if the fact trier "thinks that the taxpayer did suffer losses much smaller than claimed, but did suffer some losses the taxpayer cannot complain if the fact finder selects a half arbitrary, half intelligent figure for the losses."

On this record we are unconvinced that the petitioner suffered wagering losses to the extent claimed. We believe, however, that he did suffer some losses in addition to those allowed by the respondent in his determination and our finding of fact as to unreported income reflects that belief. In effect, it allows the petitioner losses in the amount of \$3,000 more than determined by the respondent.

This is a fact case and what we have decided is necessarily limited to the facts before us. The evidence is unsatisfying and though the result may



to some extent be speculative, that is the fault of the record as made almost exclusively by the petitioner and his close associate and "is not fatal". *Cohan v. Commissioner*, 39 F. 2d 540, 544.

Decision will be entered under Rule 50.

Served and Entered February 1, 1957.

---

Tax Court of the United States  
Washington

Docket No. 48153

JACK SHOWELL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

DECISION

Pursuant to the opinion and mandate of the United States Court of Appeals for the Ninth Circuit, remanding this proceeding, Memorandum Findings of Fact and Opinion was filed January 31, 1957, and respondent's Motion for Entry of Decision filed April 17, 1957, was placed on the calendar of May 22, 1957. There was no appearance by or on behalf of petitioner at the May 22, 1957 hearing. Upon consideration thereof, it is

Ordered and Decided: That the motion is granted.  
And it is

Further Ordered and Decided: That there is no

deficiency due from or overpayment due to the petitioner for the calendar year 1949.

Entered May 27, 1957.

[Seal] /s/ NORMAN O. TIETJENS,  
Judge.

Served and Entered May 28, 1957.

---

Tax Court of the United States  
Washington

Docket No. 48154

DOROTHY SHOWELL, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

### DECISION

Pursuant to the opinion and mandate of the United States Court of Appeals for the Ninth Circuit, remanding this proceeding, Memorandum Findings of Fact and Opinion was filed January 31, 1957, and respondent's Motion for Entry of Decision filed April 17, 1957, was placed on the calendar of May 22, 1957. There was no appearance by or on behalf of petitioner at the May 22, 1957 hearing. Upon consideration thereof, it is

Ordered and Decided: That the motion is granted.  
And it is

Further Ordered and Decided: That there is no

deficiency due from or overpayment due to the petitioner for the calendar year 1949.

Entered May 27, 1957.

[Seal]     /s/ NORMAN O. TIETJENS,  
                    Judge.

Served and Entered May 28, 1957.

---

[Title of Tax Court and Docket No. 48153.]

PETITION FOR REVIEW OF DECISION OF  
THE TAX COURT OF THE UNITED  
STATES

To the Honorable Judges of the United States  
Court of Appeals for the Ninth Circuit:

Jack Showell, the petitioner in this cause, by W. Lee McLane, Jr. and Nola McLane, his counsel, hereby files his Petition for the Review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States, entered on May 27, 1957, T. C. Docket No. 48153, determining no deficiency due from or overpayment in Federal income tax due to the petitioner for the calendar year of 1949 and respectfully shows:

I.

Jurisdiction

The petitioner on review, at the time of filing of this petition, is a citizen of the United States and resides at 352 East Palm Lane, Phoenix, Arizona. The return of income tax in respect of which the

disputed tax liability arose was filed by the petitioner with the Collector of Internal Revenue for the District of Arizona, located in the City of Phoenix, Arizona, which is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

The petitioner files this petition pursuant to the provisions of Section 7482 and 7483 of the Internal Revenue Code of 1954.

## II.

### Nature of Controversy

The controversy involves the proper determination of the petitioner's liability for Federal income tax for the calendar year of 1949.

During 1949, the petitioner maintained a written daily and weekly record on one large sheet of columnar paper of his net gains or net losses realized or sustained from his business of booking bets on football, basketball and baseball games. This written record showed a yearly net loss from wagering of \$581.09. Such amount of \$581.09 was obtained by deducting the total of recorded net gains in the sum of \$22,908.88 from the total of recorded net losses in the amount of \$23,489.97. Respondent accepted the accuracy of each daily or weekly entry reflecting a net gain, which entries totaled to the above sum of \$22,903.88. At the same time, respondent rejected the accuracy of each daily or weekly entry reflecting a net loss, except four (4) expense item entries totaling \$345.22. The result was the issuance by respondent of separate statu-

tory notices of deficiency determining that petitioner and his wife each had additional income of one-half of \$22,563.66 (the yearly total of recorded daily and weekly net gains of \$22,908.88 minus the \$345.22 of expense items). In other words, respondent based his statutory notices of deficiency, which alleged additional income, on the truthfulness of petitioner's written record, but at the same time he wholly denied the truthfulness of the same piece of paper when an entry had the effect of reducing income. The issue was whether petitioner and his wife realized additional income of \$22,563.66.

The Tax Court in an officially published regular opinion filed December 16, 1954, upheld the respondent, in effect, by determining that the alleged additional income of \$22,563.66 should be reduced by \$3,000.00 to the sum of \$19,563.66. The findings of fact made by the Tax Court consumed seven typed pages containing 1496 words found in twelve separate paragraphs.

Subsequently the petitioner filed a Petition for Review of Decision by the United States Court of Appeals for the Ninth Circuit after the matter had been submitted on briefs and oral argument. On October 10, 1956, U. S. Circuit Judge Chambers issued a majority opinion while U. S. Circuit Judge Pope wrote a dissenting opinion. The majority opinion remanded the case to the Tax Court "on the ground that the findings were not sufficiently definitive."

Thereafter, in a memorandum opinion not officially published but filed on January 31, 1957, the Tax Court reached the same conclusion it had arrived at in its earlier regular opinion filed December 31, 1954. However, the findings of fact made by the Tax Court occupied slightly more than one-half of one typed page and contained one hundred and twenty-three words found in four paragraphs.

### III.

#### Assignments of Error

The petitioner assigns as error the following acts and omissions of the Tax Court of the United States:

1. The Tax Court erred in that its findings did not comply with the opinion of the United States Court of Appeals for the Ninth Circuit remanding the case for more definitive findings of facts.

2. The Tax Court erred in finding as fact that petitioner did not keep regular, adequate and permanent books and records of his wagering transactions while at the same time sustaining respondent's determination of income which was not based on any method of reconstructing income as required by Section 41 of the Internal Revenue Code of 1939.

3. The Tax Court erred in refusing to allow petitioner to introduce evidence respecting his net worth and disbursements in view of its finding of fact that he did not keep regular, adequate and permanent books and records.

4. The Tax Court erred in treating as evidence the general presumption of correctness which attaches to the Commissioner's determination.

5. The Tax Court erred in that its decision is not supported by the evidence, is clearly erroneous, and is not in accordance with law.

Wherefore the petitioner prays that the decision of the Tax Court of the United States be reviewed by the United States Court of Appeals for the Ninth Circuit.

/s/ W. LEE McLANE, JR.,

/s/ NOLA McLANE,

Attorneys for Petitioner on  
Review.

[Endorsed]: T.C.U.S. Filed July 11, 1957.

---

[Title of Tax Court and Docket No. 48153.]

NOTICE OF FILING PETITION  
FOR REVIEW

To: John P. Barnes, Acting Chief Counsel, Internal Revenue Service, Washington, D. C.

You are hereby notified that the petitioner did, on the 11th day of July, 1957, file with the Clerk of the Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit, of the decision of said Court heretofore rendered on May 27, 1957, in the above entitled case. A copy of the petition for review as filed is hereto attached and served upon you.

Dated: July 12, 1957.

/s/ W. LEE McLANE, JR.,

/s/ NOLA McLANE,

Attorneys for Petitioner on  
Review.

Acknowledgment of Service Attached.

[Endorsed]: T.C.U.S. Filed July 18, 1957.

---

[Title of Tax Court and Docket Nos. 48153-4.]

### CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 13, inclusive, constitute and are all of the original papers as called for by the "Designation of Contents of Record on Review", in the cases before the Tax Court of the United States docketed at the above numbers and in which the petitioners in the Tax Court have filed petitions for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court cases, as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 29th day of July, 1957.

[Seal] /s/ HOWARD P. LOCKE,  
Clerk, Tax Court of the  
United States.



[Endorsed]: No. 15710. United States Court of Appeals for the Ninth Circuit. Jack Showell and Dorothy Showell, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of the Tax Court of the United States.

Filed: September 3, 1957.

Docketed: September 13, 1957.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

---

United States Court of Appeals  
for the Ninth Circuit

No. 15710

JACK SHOWELL, et ux,  
Petitioners on Review,  
vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent on Review.

STATEMENT OF POINTS UPON WHICH  
PETITIONERS INTEND TO RELY AND  
DESIGNATION OF SUPPLEMENTARY  
RECORD

Come now petitioners, Jack Showell and Dorothy Showell, and cite the following points upon which

they intend to rely for reversal of the judgment of the Tax Court:

1. The Tax Court erred in that its findings did not comply with the opinion of the United States Court of Appeals for the Ninth Circuit remanding the case for more definitive findings of facts.

2. The Tax Court erred in finding as fact that petitioners did not keep regular, adequate and permanent books and records of their wagering transactions while at the same time sustaining respondent's determination of income which was not based on any method of reconstructing income as required by Section 41 of the Internal Revenue Code of 1939.

3. The Tax Court erred in refusing to allow petitioners to introduce evidence respecting their net worth and disbursements in view of its finding of fact that they did not keep regular, adequate and permanent books and records.

4. The Tax Court erred in treating as evidence the general presumption of correctness which attaches to the Commissioner's determination.

5. The Tax Court erred in that its decision is not supported by the evidence, is clearly erroneous, and is not in accordance with law.

The petitioners designate the following portions of the record as certified by the Tax Court to the Court of Appeals for the Ninth Circuit on August 30, 1957, as necessary for a consideration of the

points upon which they intend to rely, and to be printed in a Supplementary Record:

Documents:

Docket Entries #48153 (1).

Pages 6 through 16 of petitioners' brief filed 2/23/54 (3).

Brief for respondent (4).

Memorandum findings of fact and opinion 1/31/57 (5).

Decision #48153, 5/27/57 (6).

Decision #48154, 5/27/57 (7).

Petition for review #48153 (8).

Proof of service #48153 (9).

Designation of contents of record on review #48153 (12).

Dated this 11th day of September, 1957.

McLANE & McLANE,  
/s/ By NOLA McLANE,  
Attorneys for Petitioners.

Affidavit of Mailing Attached.

[Endorsed]: Filed September 13, 1957. Paul P. O'Brien, Clerk.

